A **SAUFEE A RAHMAN**

v.

CHE YUSSOF CHE NGAH & ORS

B COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
LIM YEE LAN JCA
MAH WENG KWAI JCA
[CIVIL APPEAL NO: J-01-575-2010]
C 18 MARCH 2014

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Application by public servant - Dismissal from police force on allegation of misconduct - Disciplinary proceedings - Whether proper - Decision of Disciplinary*
D *Board - Whether amenable to judicial review - Whether public servant afforded reasonable opportunity to be heard - Whether decision tainted with procedural impropriety, illegality or irrationality - Federal Constitution, arts. 132 & 135(2)*

E ***PUBLIC SERVANTS:*** *Dismissal - Procedure - Disciplinary proceedings - Whether proper - Whether public servant afforded reasonable opportunity to be heard - Whether decision of Disciplinary Board flawed - Whether amenable to judicial review - Federal Constitution, arts. 132 & 135(2)*

F ***CONSTITUTIONAL LAW:*** *Public servants - Disciplinary proceedings - Whether proper - Whether public servant afforded reasonable opportunity to be heard - Whether decision of Disciplinary Board flawed - Whether amenable to judicial review - Federal Constitution, arts. 132 & 135(2)*

G The appellant, a Lance Corporal with the Malaysian Police Force, was arrested for an offence under s. 392/397 of the Penal Code, but was subsequently given an unconditional discharge by the Magistrate's Court. However, *vide* letter dated 26 May 2008, the appellant was informed that he was found guilty of committing a
H disciplinary offence and that a disciplinary action would be taken against him under reg. 36 of the Public Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations') which was applicable to a disciplinary misconduct not meriting reduction in rank or dismissal from service. The appellant was allowed to
I resume his duty and to receive all his unpaid emoluments with effect from the date of his interdiction on 7 December 2006. The

appellant was then transferred to the Cawangan Pengangkutan of the Johor Bahru Police Headquarters where he was asked by one Cik Nor Baini Omar, a clerk, to acknowledge receipt of a show cause letter regarding disciplinary proceedings proposed to be taken against the appellant. The appellant signed the acknowledgement letter but the actual show cause letter was not given to the appellant. Subsequently, the appellant was served with the said show cause letter by one Sjn Mustapha Abdullah which contained four charges against the appellant and also specified that the appellant had 21 days to make his representation to the disciplinary board. Since the 21 days specified in the show cause letter had expired, the appellant had applied for an extension of time to furnish his representation and requested for a copy of his statement recorded during the criminal investigations. However, the first respondent and the Disciplinary Board did not respond to the appellant's request. As a result, the appellant made his representation to the show cause letter without any supporting documents. The Johor Police Disciplinary Board found the appellant guilty in respect of the second, third and fourth charges. The appellant was given a warning pursuant to reg. 38(a) of the 1993 Regulations for the second and third charges but for the fourth charge, the appellant was informed that he would be dismissed pursuant to reg. 38(g) of the 1993 Regulations. Dissatisfied with the decision, the appellant filed an application for judicial review at the High Court to quash the decision of the Chairman of the disciplinary board and the Disciplinary Board on all four charges. The Judicial Commissioner ('JC') dismissed the appellant's application, hence this appeal. The appellant, in his memorandum of appeal ('MOA') cited that the respondents had made several violations under art. 135(2) of the Federal Constitution, such as, (i) the failure to provide the appellant a right to be heard before his dismissal; (ii) the failure to consider the appellant's representation to the show cause letter before making its decision against the appellant; and (iii) the perfunctory and mechanical manner of the disciplinary proceedings. Therefore, the appellant contended that these serious procedural flaws rendered the proceedings of the disciplinary board null and void, and the JC had erred in failing to consider the non-compliance of the disciplinary board with the rule of natural justice in its decision making process.

A B C D E F G H I

A **Held (allowing appeal; setting aside order of High Court with costs)**
Per Lim Yee Lan JCA delivering the judgment of the court:

(1) By operation of arts. 132 and 135 of the Federal Constitution,
B a public servant who wished to challenge allegations of misconduct for which punishment had been imposed could do so by challenging it in the High Court by way of judicial review. However, public servant could not challenge the punishment imposed, but only on the allegations preferred
C against him. Further, the court must not substitute its own views as to the appropriate penalty. In a judicial review, the court was concerned with the process by which an administrative or inferior tribunal arrives at its decision as in whether there was procedural impropriety, illegality or
D irrationality. (paras 70 & 71)

(2) Pursuant to art. 135(2) of the Federal Constitution, there were several serious procedural flaws and defects in the conduct of the disciplinary proceedings by the first and second respondents. Therefore, the decision of the disciplinary board
E was tainted and was amenable to judicial review. Although each of the procedural flaw appeared to be innocuous and inconsequential, when taken together, they showed that the disciplinary proceedings were conducted in a mechanical manner and the appellant was not given a real and meaningful
F right to defend himself to the four charges which had prejudiced the appellant. (paras 72 & 73)

(3) The right of a public officer to be heard before dismissal was a constitutional right accorded under art. 135(2) of the
G Federal Constitution. A court hearing a judicial review application involving the dismissal of a public officer was required to examine and scrutinise the record carefully to see that there was procedural fairness and propriety in the conduct of the disciplinary proceedings and the relevant officer
H was given a real and meaningful right to be heard in the course of the proceedings. (para 74)

(4) The learned JC had erred when she held that the appellant was given the right to be heard by the second respondent.
I The disciplinary proceedings were carried out in a mechanical manner without due regard to the constitutional right of the appellant to be afforded a reasonable opportunity of being

heard since the punishment of dismissal was meted out against the appellant. The appellant would lose his pension and gratuity rights as a result of such dismissal. Therefore, the appellant had succeeded in impugning the order of the Disciplinary Board. (paras 75-77)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, seorang Lans Koperal dengan Pasukan Polis Malaysia, telah ditangkap untuk kesalahan di bawah s. 392/397 Kanun Keseksaan tetapi kemudiannya diberi pelepasan tanpa syarat oleh Mahkamah Majistret. Walau bagaimanapun, melalui surat bertarikh 26 Mei 2008 perayu telah dimaklumkan bahawa perayu telah melakukan suatu kesalahan tatatertib dan tindakan disiplin akan diambil terhadap perayu di bawah per. 36 Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan-Peraturan 1993') yang diguna pakai bagi suatu salah laku disiplin tidak mewajarkan penurunan pangkat atau pemecatan dari perkhidmatan. Perayu telah dibenarkan untuk menyambung semula tugasnya dan menerima segala emolumen yang tidak dibayar berkuat kuasa dari tarikh penggantungan kerjanya pada 7 Disember 2006. Perayu kemudiannya dipindahkan ke Cawangan Pengangkutan di Ibu Pejabat Polis Johor Bahru di mana beliau telah diminta oleh Cik Nor Baini Omar, seorang kerani, untuk mengaku terima surat tunjuk sebab mengenai prosiding tatatertib yang akan diambil terhadap perayu. Perayu telah menandatangani surat pengakuan tersebut tetapi surat tunjuk sebab yang asal tidak diberikan kepada perayu. Selepas itu, perayu telah diberikan surat tunjuk sebab yang asal oleh Sjn Mustapha Abdullah yang mengandungi empat pertuduhan terhadap perayu dan juga menyatakan bahawa perayu mempunyai 21 hari untuk membuat representasi kepada Lembaga Tatatertib. Oleh kerana tempoh 21 hari yang dinyatakan di dalam surat tunjuk sebab tersebut telah tamat, perayu telah membuat permohonan untuk lanjutan masa bagi mengemukakan representasinya dan meminta sesalinan pernyataan yang direkodkan semasa penyiasatan jenayah. Walau bagaimanapun, responden pertama dan Lembaga Tatatertib tidak memberikan balasan kepada permintaan perayu. Oleh demikian, perayu membuat representasi kepada surat tunjuk sebab tersebut tanpa apa-apa dokumen sokongan. Lembaga Tatatertib Polis Johor mendapati perayu bersalah terhadap tuduhan kedua, ketiga dan keempat. Perayu telah diberikan amaran menurut per. 38(a)

Peraturan-Peraturan 1993 terhadap tuduhan kedua dan ketiga, tetapi bagi tuduhan keempat perayu telah dimaklumkan bahawa beliau akan dibuang kerja menurut per. 38(g) Peraturan-Peraturan 1993. Tidak berpuas hati dengan keputusan tersebut, perayu telah memfailkan permohonan untuk semakan kehakiman di Mahkamah Tinggi untuk membatalkan keputusan Pengerusi Lembaga Tatatertib dan Lembaga Tatatertib atas keempat-empat pertuduhan. Pesuruhjaya Kehakiman ('JC') telah menolak permohonan perayu, oleh itu, rayuan ini. Perayu, dalam memorandum rayuannya ('MOA') telah menyatakan bahawa responden telah membuat beberapa pencabulan di bawah per. 135(2) Perlembagaan Persekutuan, antara lain, (i) kegagalan untuk memberi perayu hak untuk didengar sebelum pemecatannya, (iii) kegagalan menimbangkan representasi perayu sebelum membuat keputusan terhadap perayu; dan (ii) prosiding tatatertib yang dijalankan sambil lewa dan secara mekanikal. Oleh itu, perayu berhujah bahawa kecacatan prosedur yang serius dalam prosiding tatatertib telah menyebabkan prosiding Lembaga Tatatertib batal dan tidak sah, dan JC telah terkhilaf apabila tidak mempertimbangkan kegagalan Lembaga Tatatertib untuk mematuhi peraturan keadilan asasi dalam proses membuat keputusan.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi dengan kos)

Oleh Lim Yee Lan HMR menyampaikan penghakiman mahkamah:

(1) Melalui peruntukan per. 132 dan 135 Perlembagaan Persekutuan, seorang penjawat awam yang hendak mencabar tuduhan salah laku yang mana hukuman telah dikenakan boleh berbuat demikian di Mahkamah Tinggi melalui semakan kehakiman. Walau bagaimanapun; seorang penjawat awam tidak boleh mencabar hukuman yang dikenakan, tetapi hanya boleh mencabar tuduhan yang dikenakan terhadapnya. Selanjutnya, mahkamah tidak boleh menggantikan pandangannya sendiri mengenai hukuman yang sesuai. Dalam semakan kehakiman, mahkamah hanya mengambil berat tentang proses di mana pentadbiran atau tribunal rendah mencapai keputusannya iaitu sama ada terdapat ketidakwajaran prosedur, ketidakpatuhan undang-undang atau keadaan tidak rasional.

(2) Menurut per. 135(2) Perlembagaan Persekutuan terdapat beberapa kecacatan prosedur yang serius dalam prosiding tatatertib yang dijalankan oleh responden pertama dan kedua. Oleh itu keputusan Lembaga Tatatertib adalah tercemar dan boleh dipinda melalui semakan kehakiman. Walaupun setiap kecacatan prosedur kelihatan tidak berbahaya dan tidak memudaratkan, tetapi apabila dipertimbangkan bersama, ia menunjukkan bahawa prosiding tatatertib telah dijalankan dengan cara yang mekanikal dan perayu tidak diberikan hak untuk membela diri terhadap keempat-empat pertuduhan yang telah memprejudiskan perayu.

(3) Hak seorang pegawai awam untuk didengar sebelum pemecatan adalah hak perlembagaan yang diperuntukkan di bawah per. 135(2) Perlembagaan Persekutuan. Mahkamah yang mendengar permohonan semakan kehakiman yang melibatkan pemecatan seorang pegawai awam dikehendaki memeriksa dan meneliti rekod untuk melihat sama ada terdapat keadilan prosedur dan keteraturan dalam menjalankan prosiding tatatertib. Oleh itu, JC telah terkhilaf dalam undang-undang dan fakta apabila beliau memutuskan bahawa perayu telah diberikan hak untuk didengar oleh Lembaga Tatatertib.

(4) JC telah terkhilaf apabila beliau memutuskan bahawa perayu telah diberikan hak untuk didengar oleh responden kedua. Prosiding tatatertib telah dijalankan secara mekanikal tanpa mengambil kira hak perlembagaan perayu untuk diberikan peluang yang munasabah untuk didengar oleh kerana hukuman buang kerja telah dikenakan terhadap perayu. Perayu akan kehilangan kesemua pencen dan hak ganjaran akibat pemecatan sedemikian. Oleh itu, perayu telah berjaya mempersoalkan perintah Lembaga Tatatertib.

Case(s) referred to:

Abdullah Borhan v. Ketua Polis Melaka & Anor [2008] 9 CLJ 605 HC ***(refd)***

B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 1 LNS 14 PC ***(refd)***

Chai Kok Choi v. Ketua Polis Negara & Ors [2008] 1 CLJ 113 FC ***(refd)***

Council of Civil Service Unions & Ors v. Minister for the Civil Service [1984] 3 All ER 935 ***(refd)***

Gnanasekaran Krishnasamy v. Suruhanjaya Perkhidmatan Awam, Malaysia & Ors [2012] 2 CLJ 985 FC ***(refd)***

Harbhajan Singh v. Suruhanjaya Pasukan Polis Malaysia & Anor [2002] 4 CLJ 85 CA ***(refd)***

Kerajaan Malaysia & Ors v. Tay Chai Huat [2012] 3 CLJ 577 FC ***(refd)***
Mat Ghaffar Baba v. Ketua Polis Negara & Anor [2008] 1 CLJ 773 CA ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah [2004] 2 CLJ 777 FC ***(refd)***
Norizan Bakar v. Panzana Enterprise Sdn Bhd [2013] 9 CLJ 409 FC ***(refd)***
Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu [2008] 6 CLJ 573 FC ***(refd)***
Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Surahanjaya Pasukan Polis & Ors [1995] 1 CLJ 619 CA ***(refd)***
Ramzan Jantan v. Timbalan Ketua Polis Johor & Anor [2008] 3 CLJ 175 CA ***(refd)***
Shamsiah Ahmad Sham v. Public Services Commission, Malaysia & Anor [1991] 1 CLJ 23; [1991] 1 CLJ (Rep) 419 SC ***(refd)***
Subry Hamid v. Husaini Tan Sri Ikhwan & Anor [2006] 4 CLJ 50 CA ***(refd)***
T Ganeswaran lwn. Suruhanjaya Polis Diraja Malaysia & Satu Lagi [2005] 3 CLJ 302 CA ***(refd)***
Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***
Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor [2012] 1 CLJ 448 FC ***(refd)***

Legislation referred to:
Federal Constitution, art. 135(2)
Penal Code, ss. 392, 397
Police Act 1967, s. 78(1)
Public Officers (Conduct and Discipline) Regulations 1993, regs. 36, 37(2)(b), 38(a), (g)

For the appellant - Ebrina Zubir; M/s Maniam Nair & Co
For the respondents - Aida Adhha Abu Bakar; SFC

[Appeal from High Court, Johor Bahru; Judicial Review No: MT2-25-40-2009]

Reported by Sandra Gabriel

JUDGMENT

Lim Yee Lan JCA:

[1] This appeal is in respect of the decision of the High Court at Johor Bahru dated 2 September 2010 in which the learned Judicial Commissioner ("JC") had dismissed the appellant's

application for judicial review of the respondents' decision to dismiss the appellant from the service of the Malaysian Police Force.

[2] We heard the appeal and after giving due consideration to the submissions of respective counsel, we allowed the same and now give our reasons.

Background Facts

[3] The appellant was a member of the Malaysian Police Force and his last designation was as a Lance Corporal.

[4] Following his arrest on 26 November 2006 and criminal proceedings instituted against him at the Magistrate's Court at Rompin for an offence under ss. 392 and 397 of the Penal Code, the appellant was interdicted from his duty under s. 78(1) of the Police Act 1967 with effect from 7 December 2006 and was granted half of his emoluments while awaiting trial at the Magistrate's Court.

[5] The appellant was subsequently given an unconditional discharge by the Magistrate's Court.

[6] On 26 May 2008 the appellant was informed *vide* a letter from the Johor Police Contingent Headquarters that departmental investigation carried out by the Johor Police Contingent Headquarters showed that he had committed a disciplinary offence and that disciplinary action not with a view to reduction in rank or dismissal would be taken against him under reg. 36 of the Public Officers (Conduct and Discipline) Regulations 1993 ("the 1993 Regulations") as soon as possible.

[7] By the same letter the appellant was also informed that he would be allowed to resume his duty and to receive his unpaid emoluments with effect from the date of his interdiction on 7 December 2006.

[8] On 3 June 2008 the appellant reported for duty at the Cawangan Pengangkutan of the Kota Tinggi Police Headquarters and on 23 July 2008 he was transferred to the Cawangan Pengangkutan of the Johor Bahru Police Headquarters.

[9] On 18 March 2009, the appellant was asked by a clerk in his work station by the name of Cik Nor Baini Binti Omar to acknowledge receipt of a show cause letter regarding disciplinary proceedings proposed to be taken against him. The appellant signed the acknowledgement letter but the actual show cause letter was not given to him because, according to Nor Baini, there was no senior officer available to sign off the service of the show cause letter. Cik Nor Baini promised to contact the appellant to serve on him the show cause letter as soon as it was signed by a senior officer.

[10] The appellant claimed that he only had a glance of the show cause letter which was dated 11 March 2009 under a caption "Surat Tindakan Tatatertib Dengan Tujuan Buang Kerja atau Turun Pangkat di bawah Peraturan 37, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993".

[11] Between 25 March 2009 to 22 April 2009 the appellant was away on official duty in Perak, Ulu Kinta and Mersing on three separate assignments.

[12] On 23 April 2009, upon his return to the Johor Bahru Police Headquarters, the appellant was served with the said show cause letter by one Sjn Mustapha bin Abdullah of the Cawangan Pengangkutan.

[13] The said show cause letter contained four charges against the appellant and also specified that he had 21 days to make his representation to the relevant Disciplinary Board.

[14] Since the 21 days specified in the show cause letter had expired on 8 April 2009, the appellant had *vide* a letter dated 29 April 2009 applied for an extension of time to furnish his representation. In the said letter he also requested for a copy of his statement recorded during the criminal investigations. The letter was sent to the first respondent through a clerk by the name of Encik Shamsul Zamri bin Jumain from the Administration Section of the Cawangan Pengangkutan.

[15] However, the appellant never received any feedback from the respondents regarding his request for extension of time to make his representation as per his letter dated 29 April 2009.

[16] *Vide* a letter dated 26 May 2009 the appellant made his representation to the show cause letter without any supporting document although he had requested for them. His letter of representation was acknowledged receipt by the Johor Police Headquarters on 1 June 2009.

[17] On 31 July 2009, at about 12.30pm the appellant received a letter dated 30 July 2009 from the chairman of the Johor Police Disciplinary Board informing him of the board's decision on the four charges in the show cause letter against him, ie, in respect of the first charge he was found not guilty but in respect of the second, third and fourth charges he was found guilty as per charged. In respect of the second and third charges he was given a warning pursuant to reg. 38(a) of the 1993 Regulations and in respect of the fourth charge, he was informed that he would be dismissed from the service of the police force with effect from 30 July 2009 pursuant to reg. 38(g) of the 1993 Regulations.

[18] Dissatisfied with the decision the appellant filed an application for judicial review at the Johor Bahru High Court seeking, *inter alia*, the following reliefs:

(a) a *certiorari* to quash the decision of the chairman of the Disciplinary Board and the Disciplinary Board on all the four charges;

(b) an enquiry be held to ascertain the arrears in salary, emoluments, allowances and benefits to which the appellant was entitled to receive from the date of his dismissal until full settlement.

The High Court Decision

[19] The appellant's application did not find favour with the learned JC who dismissed his application on 2 September 2010 for the reasons stated in her grounds of judgment dated January 2011.

This Appeal

[20] Aggrieved by the decision of the learned JC, the appellant filed this appeal before us citing 11 grounds in his memorandum of appeal. However, during submission before us, learned counsel for the appellant confined herself to the following issues.

The Respondents Breached Art. 135(2) Of The Federal Constitution

[21] The first issue raised was that the Respondents failed to comply with art. 135(2) of the Federal Constitution which provides that no member of the public service shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard.

[22] It was submitted that there were several procedural unfairness and impropriety in the conduct of the disciplinary proceedings by the respondents, which had deprived the appellant of his constitutional right to be heard as guaranteed under art. 135(2) of the Federal Constitution.

[23] The first procedural unfairness was the delay in the service of the show cause letter dated 11 March 2009 on the appellant. It was submitted that by the time the appellant actually received the show cause letter, the 21 days provided in reg. 37(2)(b) of the 1993 Regulations for him to make his representation lead long expired. This was a serious procedural flaw in the disciplinary proceedings which had seriously affected the appellant's right to be heard before his dismissal and rendered the proceedings of the Disciplinary Board null and void.

[24] The second procedural impropriety was that first respondent and the Disciplinary Board had never responded to the appellant's request *vide* his letter dated 29 April 2009 for an extension of time to file his representation and a material document requested by him in order to enable him to make his representation. As a result the appellant was forced to make his representation to the four charges preferred against him without the benefit of any supporting document.

[25] The respondents had never replied to the appellant's specific allegation in his affidavit in support of his judicial review application that there was no proper service of the show cause letter on him by the respondents and that there was no feedback from the respondents to his application *vide* his letter dated 29 April 2009 seeking an extension to make his presentation.

[26] It was submitted that since there was no rebuttal evidence from the respondents through Puan Nor Baini binti Omar and Sjn Mustapha bin Abdullah to deny the specific assertion of the

appellant, it would tantamount to an admission of such assertion of fact by the appellant (see: *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281 (CA)). A

[27] The third and more serious flaw in the disciplinary proceedings of the Disciplinary Board was that despite having received the appellant's representation to the show cause letter *vide* his letter dated 26 May 2009, which was acknowledged received by the respondents on 1 June 2009, the Disciplinary Board never bothered to consider his representation at all before making its decision against him. Although the first meeting of the Disciplinary Board was scheduled on 22 May 2009, it never went on and the proceedings were only held on 1 July 2009 by which time the Disciplinary Board had already received the written representation of the appellant. There was no reason for the board not to consider the representation of the appellant in view of the seriousness of the charges made against him. B C D

[28] The fact that the appellant's representation was not considered at all by the Disciplinary Board was proven by the letter of the Disciplinary Board dated 30 July 2009 in which he was informed of the result of the disciplinary proceeding, wherein para. 1 had stated that "Lembaga Tatatertib mendapati anda telah tidak mengemukakan surat representasi pada menjawab surat tunjuk sebab bilangan (PR) RF/104942". E

[29] This was corroborated by para. 14.1 of the minutes of the board's proceedings in which it was stated that "subjek tidak berminat atau berhasrat untuk menghantar representasinya" but in the later part of the minutes it was stated that "LTT turut menimbang representasi lewat yang telah dihantar oleh subjek di dalam memutuskan hukuman tatatertib". F G

[30] In an attempt to cover up their procedural impropriety, the respondents then purported to swear an averment through para. 30 of their affidavit in reply (see p. 83 record of appeal jilid 2 p. 2) to the appellant's affidavit in support of his application for judicial review in which it was stated that the appellant's representation was considered before the Disciplinary Board meted out its punishment, when such an averment was contradictory to the aforementioned para. 14.1 of the minutes of the proceedings and was also in direct contradiction to its letter to the appellant dated H I

30 July 2009 in which it was stated that the appellant was found to be not interested in making his representation and was obviously an afterthought.

[31] It was further submitted that it was surprising that the minutes of the disciplinary proceedings stated that the Disciplinary Board took into consideration the late representation of the appellant before it passed sentence when the appellant's letter of 26 May 2009 was not even a letter of mitigation for a lesser punishment but rather his representation in which he had denied all the allegations of wrongdoings made against him in the four charges.

[32] It was contended that the truth of matter was that the Disciplinary Board never considered the representation of the appellant as indicated in its letter of notification dated 30 July 2009; and the minutes of meeting of the Disciplinary Board at pp. 142 to 158 RR jilid 2 in which it was stated that the second respondent considered the late representation of the appellant before it meted out the punishment were a rectified or edited version and an attempt to cover an oversight on the part of the Disciplinary Board.

[33] In other words the disciplinary proceedings in this case was conducted in a perfunctory and mechanical manner by the Disciplinary Board without due regard to the constitutional right of the appellant as enshrined in art. 135(2) of the Federal Constitution.

[34] In the light of the various substantive and procedural flaws in the disciplinary proceedings pointed out by the appellant in his affidavit in support of his application for judicial review, the learned JC ought to have scrutinised the record before her carefully and with caution but she failed to do so. The learned JC therefore erred in law and fact when she held that the appellant had been given the right to be heard by the Disciplinary Board.

Failure To Furnish The Appellant With A Material Document

[35] The next procedural flaw was the Disciplinary Board's failure to respond to the appellant's request for a copy of a statement recorded from him during the criminal investigations.

[36] It was submitted on behalf of the appellant that the said statement was a material document to enable the appellant to prepare his defence especially when from the minutes of the disciplinary proceedings it would appear that the Disciplinary Board had implied that he had admitted to his involvement in the offences alleged against him.

[37] The respondents in their affidavit in reply to the appellant's affidavit in support of his application purported to exhibit a copy of the minutes of the Disciplinary Board dated 18 August 2009 (exh. CYCN2) (see p. 135 RR jilid 2) in which it was alleged that the appellant failed to attend to a "semboyan" dated 5 May 2009 in which he was asked to attend on 7 May 2009 to take a look at the official record.

[38] Paragraph 14.1.1 of the minutes of the disciplinary proceedings in exh. CYCN2 stated that the secretariat of the Disciplinary Board had purportedly checked with the Administration Section of the Cawangan Pengangkutan Polis Johor Bahru who confirmed that it received the "semboyan" and would inform the appellant of the "semboyan".

[39] The appellant in his affidavit in reply to the respondents' affidavit had averred that he never received the "semboyan" in exh. CYCN2. The "semboyan" was allegedly sent to PTL (Pengangkutan) Johor and not to the appellant and there was no proof that the person that received the "semboyan" had informed or served the "semboyan" on the appellant. It was submitted that "to inform" is different from "had been informed" and there was no averment from the respondents as to who had informed the appellant of the "semboyan".

[40] It was submitted that while decided cases had established that there was no added duty on the disciplinary authority to provide documents without any requests being made by an offending officer, but where a material document was requested by the offending officer to enable him to make an effective and meaningful defence to the charges and it was not forthcoming, it would amount to a breach of natural justice as embodied in art. 135(2) of the Federal Constitution which rendered the disciplinary proceedings null and void (see: *T Ganeswaran lwn. Suruhanjaya Polis Diraja Malaysia & Satu Lagi* [2005] 3 CLJ 302 Held [6] (AC), *Chai Kok Choi v. Ketua Polis Negara & Ors* [2008]

1 CLJ 113; [2008] 1 MLJ 725 (FC) Held (2) and *Mat Ghaffar Baba v. Ketua Polis Negara & Anor* [2008] 1 CLJ 773; [2008] 2 MLJ 1 Held (2) and (3)).

[41] For the above reasons, it was contended that the learned JC erred when she failed to consider that the Disciplinary Board had failed to comply with the rule of natural justice in its decision making process.

The Disciplinary Board Took Into Account Damaging Statement In A Report Dated 21 July 2008 Behind The Back Of The Appellant

[42] The next issue raised was that the respondents had taken into account damaging statement in a report dated 21 July 2008 during the disciplinary proceedings behind the back of the appellant.

[43] It was submitted that the respondents committed procedural unfairness when it failed to give notice to the appellant that it would be relying on the report and to give him an opportunity to rebut, contradict or controvert the contents of the report. This had prejudiced the appellant and rendered his dismissal bad in law (see: *B Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 1 LNS 14; [1962] MLJ 169 (PC), *Shamsiah Ahmad Sham v. Public Services Commission, Malaysia & Anor* [1991] 1 CLJ 23; [1991] 1 CLJ (Rep) 419; [1990] 3 MLJ 364 (SC), *Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Surahanjaya Pasukan Polis & Ors* [1995] 1 CLJ 619; [1995] 1 MLJ 308 at p. 309, *Subry Hamid v. Husaini Tan Sri Ikhwan & Anor* [2006] 4 CLJ 50 (CA) and *Ramzan Jantan v. Timbalan Ketua Polis Johor & Anor* [2008] 3 CLJ 175; [2008] 3 MLJ 214 (CA)).

[44] In *B Surinder Singh*, the Privy Council opined that "... If the right to be heard is a real right which is worth anything, it must carry with it a right in the accused person to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and he must then be given a fair opportunity to correct or contradict them".

The Fourth Charge Was Lacking In Particulars, Vague And Confusing

[45] The next issue raised by the appellant was that the fourth charge under which the appellant was dismissed from service was defective, unclear and the particulars therein contradict one another. The fourth charge had been set out in full by the learned JC in para. 5.2(b) of her grounds of judgment at p. 25 of RR vol. 1.

[46] It was submitted that the fourth charge was the main charge against the appellant as it had resulted in his dismissal from the public service. A perusal of the said charge showed that the particulars were confusing and conflict with one another. The appellant was said to have "menerima apa-apa ganjaran hadiah" without stating the date and time he received the "benefit" or what was the benefit he had received and the second part of the charge said he "telah bersetuju menerima".

[47] It was submitted that the respondents could not blow hot and cold at the same time and must decide whether the appellant had received the RM200 or only agreed to receive the said sum of money.

[48] It was further submitted that the charge in the fourth charge was general in nature because it did not state how the RM200 was paid, was it in cash or cheque and whether there is any documentary or other evidence to support such allegations (see: *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* [2012] 1 CLJ 448; [2012] 5 MLJ 465 and *Mat Ghaffar Baba v. Ketua Polis Negara & Anor* [2008] 1 CLJ 773; [2008] 2 MLJ (CA)).

[49] Since the finding of guilt of the appellant resulting in his dismissal was based on a defective charge, it could not stand in law thus rendering the appellant's dismissal to be without just cause or excuse.

[50] In *Abdullah Borhan v. Ketua Polis Melaka & Anor* [2008] 9 CLJ 605 at pp. 611-613, Low Hop Bing JCA (as he then was) held as follows:

> ... [13] I am of the view that the procedural requirements in drafting a charge meant for a criminal trial would apply with equal force to a disciplinary charge such as in the instant case because both of them share the common denominator ie, penal consequences ...

A [14] It is a trite law that the charge in question must be precisely formulated to include the specific accusation against the plaintiff who has the right to know and must have notice of the very nature of the charge at the first opportunity, so that the plaintiff is forewarned with clarity and certainty the essential elements or ingredients against him in order to ensure that he can be
B forearmed in his defence for the purpose of directing all the evidence exclusively to the specific charge.

[17] ... This ground alone would have expeditiously disposed of the suit herein without further ado. ...

C *Condonation By The Respondents Of The Disciplinary Offence Committed By The Appellant*

[51] It was lastly contended that there was a condonation by the third respondent of the appellant's disciplinary misconduct when
D *vide* a letter of 26 May 2008 from the Deputy Head of the Johor Police Contingent Headquarters, the appellant was allowed to resume his duty and to receive all his unpaid emoluments with effect from the date of his interdiction on 7 December 2006 and he was told that disciplinary proceedings would only be taken
E against him under reg. 36 of the 1993 Regulations, which is applicable to a disciplinary misconduct not meriting reduction in rank or dismissal from service.

[52] It was only a year after the appellant had resumed his duty
F that disciplinary proceedings under reg. 37 with a view to his dismissal were taken against him.

[53] It was submitted that there was a passive act of condonation on the part of the respondents when they failed to
G take disciplinary proceedings under reg. 37 when criminal investigation had been completed during the period of the appellant's interdiction.

[54] There was a contradiction between the contents of the said letter and para. 37 of the affidavit in reply of the respondents
H which had stated that the Deputy Police Chief of Johor had decided that the disciplinary proceeding would be taken against the appellant under reg. 37 when the letter clearly stated that action would be taken under reg. 36 of the 1993 Regulations.

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[55] The learned JC erred when she held that under the 1993 Regulations there is no time limit within which a disciplinary authority can take action for any disciplinary offence. She did not in her judgment consider the submission made on the issue of condonation of the appellant's conduct which warranted dismissal.

[56] The learned JC erred when she relied on the case of *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573 where the facts were different from this case. There, disciplinary action was taken against the deceased during the period of his interdiction unlike this case where the appellant was allowed to resume duty and to receive all his unpaid emoluments withheld from him during the period of his interdiction. There was therefore procedural impropriety and bad faith on the part of the respondents.

[57] In conclusion, it was submitted that for the above reasons the appellant's appeal ought to be allowed.

Submission For Respondents

[58] Learned Senior Federal Counsel, on the other hand, submitted that there is no merit in this appeal for the following reasons.

[59] Disciplinary proceedings against police officers are governed by the Public Officers (Conduct and Discipline) Regulations 1993 [Amendment 2002] and Part V of the Regulations 1993 set out the procedures pertaining to the dismissal or reduction in rank of a public officer.

[60] It was submitted that the concept of procedural unfairness which is enshrined in art. 135(2) of the Federal Constitution had been incorporated into the 1993 Regulations, and all the procedures in the 1993 Regulations on dismissal have been clearly followed in this case and the appellant had been given reasonable opportunity of being heard.

[61] In this case, the show cause letter set out the grounds on which it was proposed to dismiss the appellant and he was given 21 days to make his written representation. Even though his representation exceeded the 21 days stated in the show cause letter, the Disciplinary Board nevertheless had taken his representation into account before making its decision. There was therefore no procedural impropriety in this case.

[62] It was also submitted that the fourth charge against the appellant was clear, unambiguous, straight forward and not defective. The charge is "not general in nature". The mode and payment whether in the form of "cheque" or "cash" is a matter of evidence. The court is only concerned with the decision making process and should not step into the shoes of the Disciplinary Authority. Its role is only supervisory in nature.

[63] There is a long line of cases that decided that the courts should not turn a disciplinary authority or tribunal into a court of law trying a criminal case, and a disciplinary authority should not be burdened with technicalities regarding standard of proof, the rules of evidence and procedures that are applied in a court of law (see: *Gnanasekaran Krishnasamy v. Suruhanjaya Perkhidmatan Awam, Malaysia & Ors* [2012] 2 CLJ 985, *Harbhajan Singh v. Suruhanjaya Pasukan Polis Malaysia & Anor* [2002] 4 CLJ 85, *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 CLJ 577.

[64] Based on the above case law authorities, it was submitted that the strict rules of evidence are not to be applied to a disciplinary inquiry and the real question in this case was whether the appellant had been accorded procedural fairness and it was submitted that the answer would be in the affirmative.

[65] It was further submitted that the issue of condonation did not apply in this case. It must be noted that disciplinary proceedings are distinct from criminal proceedings. Although the appellant was cleared of the criminal charge at the Magistrate's Court and was therefore allowed to resume his duty, it could not stop the government from taking disciplinary action against him.

[66] In regard to the issue raised that the letter of the Johor Police Contingent dated 26 May 2008 had stated that disciplinary proceedings would be taken against the appellant under reg. 36 of the 1993 Regulations, which governs procedure for disciplinary proceedings not with a view to reduction in rank or dismissal, it was submitted that ultimately what charge to be framed against the appellant was for the relevant disciplinary authority conducting the disciplinary proceedings against him to decide, taking into account all the relevant investigation papers and information it had before it. In this case the second respondent had decided to proceed under reg. 37 of the 1993 Regulations.

[67] In regard to the internal investigation report, it was submitted that it was part and parcel of the investigation papers which were used by the disciplinary authority to determine the nature of the breach of discipline, whether it warrants a punishment of dismissal or reduction in rank. If the breach warrants a dismissal or a reduction in rank, the disciplinary authority should follow the procedure in reg. 37. Otherwise, the disciplinary authority will use reg. 36.

[68] It was submitted that reg. 37 is silent on the furnishing of the internal investigation report to the officer. There is therefore no duty on the disciplinary authority to supply the report to the appellant. There cannot be a breach of a duty if the law does not provide for such a duty (see: *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah* [2004] 2 CLJ 777, at p. 255 f-h).

[69] It was submitted that for the foregoing reasons, the appellant has failed to prove his case upon a balance of probabilities against the respondents. The disciplinary actions taken against the appellant were done in accordance with law. Procedural and substantive fairness had been accorded to the appellant and no injustice had been caused to him. Hence, the appellant's appeal should be dismissed with costs.

Our Decision

[70] It is not in dispute that a public servant can challenge a disciplinary proceedings against him by way of a judicial review. In *Norizan Bakar v. Panzana Enterprise Sdn Bhd* [2013] 9 CLJ 409, the Federal Court held as follows:

> [26] ... It (sic) can also be no dispute that by operation of arts. 135 and 132 of the Federal Constitution, a public servant who wishes to challenge any allegation of misconduct against him, for which punishment has been imposed, can only do so by challenging it in the High Court by way of judicial review. The said public servant cannot challenge the punishment imposed, but only on the allegations preferred against him. The right of public officers to challenge any disciplinary action against them is well explained by Peh Swee Chin FCJ in *Ng Hock Cheng* which is as follows:
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> > A public officer is entitled to impugn any allegation or accusation of any disciplinary breach against him by way of judicial review on the protection given by art. 135 of the

> Federal Constitution providing that no member of such service shall be dismissed or reduced in rank except: (a) only by an authority that appointed him in the first place; and (b) after being given a reasonable opportunity of being heard. He is, in addition, entitled to protection from sufficient compliance with the rules of natural justice and the disciplinary procedure provided therefore, see *Mohd bin Ahmad v. Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 3 CLJ 135; [1997] 2 MLJ 361.

[27] Peh Swee Chin FCJ further explained why the court must not substitute its own views as to what is the appropriate penalty (for the employee's misconduct) for the view of the particular employer concerned. His Lordship stated that:

> If the public officer succeeds in so impugning, any order of punishment including an order of dismissal can be declared invalid or void, and such order being so declared void, is deemed not to have been made at all or is deemed to have been only purportedly made previously. But if the public officer fails to so impugn, any order of punishment remains and there should be no further review on such order of punishment.

[71] It is also trite law that in hearing a judicial review, the High Court is only concerned with the application of procedural fairness in relation to the decision-making process and not the decision itself (see: *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771). In other words, in a judicial review, the court is concerned with the process by which an administrative or inferior tribunal arrives at its decision, in the sense of whether there was procedural impropriety, illegality or irrationality; or whether it had taken all relevant matters into consideration and had not taken any irrelevant consideration into account and whether it had sufficient evidence and material before it to decide (see: *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1984] 3 All ER 935). In so doing the court is required to examine the record and to satisfy itself of all the aforesaid matters.

[72] Reverting to the appeal before us, bearing in mind the provisions in art. 135(2) of the Federal Constitution and the principles in judicial review as laid down in the often-quoted case of *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1984] 4 All ER 935, we are inclined to agree with learned

counsel for the appellant that in this case, there were several serious procedural flaws and defects in the conduct of the disciplinary proceedings by the first and second respondents as detailed in her submission which had tainted the decision of the Disciplinary Board and made it amenable to judicial review.

[73] In so deciding, we were of the considered view that although each of the procedural flaw or improprieties by itself may appear to be innocuous and inconsequential, but when taken together and cumulatively, they tended to show that the disciplinary proceedings were conducted in a mechanical manner and in reality the appellant was not given a real and meaningful right to defend himself to the four charges which had prejudiced the appellant.

[74] In this regard, we are inclined to agree with learned counsel for the appellant that as the right of a public officer to be heard before dismissal is a constitutional right accorded under art. 135(2) of the Federal Constitution, a court hearing a judicial review application involving the dismissal of a public officer is all the more required to examine and scrutinise the record carefully to see that there was procedural fairness and propriety in the conduct of the disciplinary proceedings and the relevant officer was given a real and meaningful right to be heard in the course of the proceedings.

[75] We agree with the appellant that the learned JC failed to take into account the various procedural flaws in the disciplinary proceedings against the appellant in the light of the constitutional protection accorded to a public officer in art. 135(2) of the Federal Constitution and the aforesaid principles relating to judicial review when considering the appellant's application for judicial review.

[76] We further agree with the appellant that the learned JC erred when she held that based on the record before her the appellant was given the right to be heard by the second respondent when the documents of the respondents demonstrated that the disciplinary proceedings were carried out in a mechanical manner without due regard to the constitutional right of the appellant to be afforded a reasonable opportunity of being heard when the punishment of dismissal was meted out against him, especially considering the fact the appellant would lose all his pension and gratuity rights as a result of such dismissal.

A **[77]** For the above reasons, we were therefore of the view that the appellant had succeeded in impugning the order of the Disciplinary Board. In the premises, we allowed the appeal and set aside the order of the JC and substitute it with the orders prayed for by the appellant in his application. We also awarded fixed
B costs of RM5,000 to the appellant and ordered that the deposit be refunded to him.

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